No. 12573

IN THE

United States
Court of Appeals
For the Ninth Circuit

G. CLIFFORD SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court
District of Arizona

BRIEF FOR APPELLEE

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STATEMENT OF PLEADINGS AND FACTS

The indictment in this case contains two counts, each charging the defendant, who will hereinafter be referred to as appellant, with violation of Section 287, Title 18, U. S. Code.

The first count charges appellant with presenting to the Veterans Administration, an agency of the United States of America, for payment, a claim in the name

and on behalf of the Arizona Institute of Aeronautics, Inc., hereinafter referred to as "the company". The claim was in the sum of $700.00 and was for books and tools claimed to have been furnished certain trainees attending the school operated by the company.

The second count is identical with the first count, except for the names of the trainees and the amount of the claim.

Each count alleges that the appellant knew the claim to be false in that the trainees had not been furnished with books and tools of the value set out in each voucher. (T. R. 11, 12).

Appellant was the prime mover in the organization of the company and was the head of the school. (T. R. 109).

The company had a contract with the Veterans Administration which provided that the company was to furnish certain tools and books to the trainees. (T. R. 43).

The contract also provided that the company should prepare and certify vouchers for books, supplies and equipment after they were furnished or re-issued. (T. R. 45).

Appellant raises no question as to the sufficiency of the indictment or the evidence. We, therefore, deem it unnecessary to make any further statement of the facts. We will, however, advert to the testimony whenever necessary to present the Government's position on the rulings of the court complained of in the Specifications of Errors.

The appellant's brief correctly shows the jurisdiction of the district court and of this court.

QUESTIONS PRESENTED

1. "Due Process of Law," as set forth in the Fifth Admendment to the Federal Constitution, was denied defendant in that the trial court erroneously ruled that a Statute of the United States had been replaced by another, when such statute was and still is in force and effect. Whereupon defendant did not have a trial according to the "Law of the Land" or by "Due Process of Law".

2. "Due Process of Law," as set forth in the Fifth Amendment to the Federal Constitution, was denied defendant in that the language of Title 18, U. S. Code, Section 287 as interpreted by the trial judge required a lesser degree of proof of felonious or fraudulent intent than if the defendant was to be tried according to the language of Title 18, U. S. Code, Section 1001, which, as interpreted by the trial judge, required proof of a specific fraudulent or felonious intent.

3. Where fraudulent intent or guilty knowledge is in issue, regulations controlling the form and preparation of vouchers are relevant and material, and the exclusion of material evidence offered on behalf of the accused in a criminal case is reversible error.

In the instant case, the exclusion of the Rules and Regulations from evidence made the issue of the falsity of the claim or of the knowledge or intention of the defendant impossible to determine and denied to defendant the "Due Process of the Law".

4. Where fraudulent intent is in issue, the intent may be inferred from the circumstances of the case and it is competent to give evidence of any circumstances tending to show that the act was done with a different intent from that necessarily involved in the

charge. (*People v. Martell, 21 Cal. App. 573, 132 Pac. 600.*)

5. Where defendant was not permitted to cross-examine a hostile witness as to matters which had a direct bearing upon the interest, bias and motives of such witness, then such curtailment and limitation of cross-examination was in violation of

Amendment VI to the United States Constitution, with reference to its pertinent provisions to the instant case, which states:

> "In all criminal prosecutions, the accused shall enjoy the right . . .; to be confronted with the witnesses against him . . ."

6. Comments by the trial judge made during the course of trial evidenced prejudice on the part of the court so as to deprive defendant of a fair trial, and that the said comments amounted to a determination of the merits and on the issue which the jury was to determine, thereby abridging the right to a fair trial guaranteed by the Sixth Amendment to the United States Constitution.

7. The action of the trial court in recalling the jury from its deliberation in the jury room and stating that the court heard everything the jury said; and that the jury was paying little attention to the court's instructions; and that unless a verdict was reached within a specified time (20 minutes), that the judge would not be available unless he could get an elevator; and that the statement of the trial judge,

> ". . . If you haven't arrived at a verdict by that time, comfortable quarters will be provided for you in a hotel."

was an undue interference with the privacy and deliberations of the Jury, and resulted in coercion and

intimidation, all of which is a denial to a trial by

". . . an impartial jury"

and which right is guaranteed by the Sixth Amendment to the United States Constitution.

ARGUMENT

In our argument, we will discuss appellant's specifications of error in the order in which they appear in his brief:

SPECIFICATION OF ERROR NO. 1

(Appellant's Brief, page 23)

In this specification, the appellant complains of the court's ruling in denying defendant's Motion to Dismiss, on the ground that the trial court stated in its ruling that Section 1001 of Title 18 had been replaced and the indictment was brought under the new section, No. 287, Title 18, when, as a matter of fact, both sections were in full force and effect.

In appellant's argument in support of this specification, he complains that he was not tried according to the "Law of the Land" and relies upon the "Due Process of Law" provision of Amendment V of the Constitution of the United States.

We do not deny that every defendant is entitled to the protection of the "Due Process of Law" provision of our Constitution. We have no quarrel with the authoritites cited by appellant in his brief in support of that principle.

In the complaint before the Commissioner, the appellant was charged under Section 1001, Title 18 U.S.C. In fact, the caption of the Commissioner's complaint referred to Title *19*. (T. R. 2).

In the indictment returned by the Grand Jury, violation of Section 287, Title 18, U.S.C. was charged. (T. R. 11).

The whole theory of appellant's position is contained in the last paragraph of page 25 of his brief:

> "It is apparent from the discussion by the learned Judge that the reason for denying defendant's Motion was based upon his ruling that Title 18, U. S. Code, Section 1001 was no longer law."

It is apparent from this statement that appellant's premise is false and his conclusion a *non sequitur.*

The question the court had before it was whether the indictment stated an offense under Section 287, Title 18, U.S.C. or any other section of the Federal Statutes. Justice Holmes said many years ago:

> "It is wholly immaterial what Statute was in the mind of the District Attorney when he directed the indictment if the charges made are embraced by some Statute in force."

Williams v. U.S., 168 U.S. 382-389.
Rogers v. U.S., 180 Fed. 54-59.

SPECIFICATION OF ERROR NO. 2

(Appellant's Brief, page 27)

This specification is merely a repetition and duplication of Specification No. 1. With the exception of a few comments, we rely on our answer to Specification No. 1.

The only additional argument offered by appellant in support of Specification No. 2 is based upon the wrong premise that the appellant is being prosecuted under Section 1001, Title 18 U.S.C., rather than Section 287, Title 18 U.S.C. Both of these sections are taken from the old Section 80 of Title 18, U.S.C.

Whether the court in its remarks (T. R. 36) meant that Section 1001, referred to in the Commissioner's complaint, was replaced in the indictment by Section 287; or whether the court was under the erroneous impression that Section 1001 had been replaced in the Statutes by Section 287 is immaterial. The fact still remains that the appellant was prosecuted under Section 287. The Court, in its instructions, was governed by Section 287, and there were no exceptions taken to the instructions. (T. R. 190).

SPECIFICATION OF ERROR, NOS. 3 and 4

(Appellant's Brief, page 33)

Specification No. 3 complains of the court's ruling, excluding from the evidence, Regulations and Procedure ‡10539 and Manual M 7-5, on the ground that they "are the best evidence concerning what the regulations are".

Specification No. 4 complains of the court's ruling, excluding the same items on the ground that they "would have a direct bearing upon the lack of fraudulent intent of the defendant".

The fact that the documents would be the best evidence of what they contained would not, in itself, make them admissible. They would still have to be material. They were not marked for identification and were not made a part of the record in this court. There is, therefore, no way in which this court can determine their materiality. The only knowledge which we have of the contents of the documents under consideration is gathered from the testimony of the witness who produced them in court, the questions and answers concerning which are, in part, as follows:

"Q. (By Mr. Wheeler): Do you have a copy of Regulation 10539, Rules and Procedure Manual, M7-5 with you, Mr. Robbeloth?"

"A. Yes. * * *"

"Q. Well, with the permission of the court, to clarify the matter, is there a provision therein to bill at irregular intervals?"

"A. There are provisions to bill at irregular intervals for supplies which are furnished."

"The Court: May I ask a question? Is there a provision for the billing of tools before they are actually furnished?"

"The Witness: No, sir."

"Q. (By Mr. Wheeler): Is there a provision therein that tools and books on order or which have not been issued, Mr. Robbeloth, are considered to be furnished?"

"A. Not to my knowledge." (T. R. 48, 49)

From the foregoing, it clearly appears that the appellant would receive neither aid nor comfort from the regulations.

If the documents contained any provisions that would tend to justify appellant in filing the false vouchers, that part should have been called to the attention of the court and read into the record, and an offer of proof made, so that the trial court and this court could determine its admissibility; or if the documents contain matter of which the court could take judicial notice, then an instruction based upon them should have been requested.

To permit litigants to offer voluminous documents in evidence without pointing out their materiality would seriously interfere with the orderly and expeditious trial of cases. The court should not be required to read such documents.

SPECIFICATION OF ERROR NO. 5

(Appellant's Brief, page 38)

In specification No. 5, appellant complains of the court's refusal to admit in evidence other vouchers which had been submitted to the Veterans Administration by the company and which were signed by officers of the company other than the appellant.

It is the contention of the appellant that those vouchers signed by other officers were handled just the same as the vouchers which the indictment charges the appellant with filing. To be more specific: that other officers of the company signed and filed vouchers for supplies which had not been furnished, thereby establishing a course of action that was followed by appellant. (T. R. 149, 150).

Appellant cites no authorities to support his theory that such action on the part of other officers would relieve the appellant of all criminal liability.

As a matter of record, appellant was permitted to introduce testimony concerning other vouchers. (T. R. 153).

At the trial of the case, the appellant testified that he signed the vouchers after checking the receipts signed by the students, which receipts showed that all of the tools had been received by them. (T. R. 151).

The position taken by the appellant that, according to his knowledge, based on the receipts, the tools had been delivered, is inconsistent with the theory under Specification of Error No. 5. The theory there is that he was following a course of action theretofore adopted by the company and approved by the Veterans Administration in vouchering for tools before they were delivered.

The Jury heard all of the evidence and found the defendant guilty. They evidently did not believe his testimony about examining the receipts, but did believe the testimony of the witness, Streicher, whose testimony was to the effect that the false vouchers were prepared and filed on the advice of and with the knowledge of appellant. (T. R. 102). (T. R. 107, 108).

SPECIFICATION OF ERROR NO. 6

(Appellant's Brief, page 42)

In this specification, appellant complains of the ruling of the court in sustaining the Government's objection to questions asked of Government's witness, Streicher, concerning the internal affairs of the company.

In appellant's brief (page 43), it is stated that the testimony of the trainees revealed that it was the witness, Fred W. Streicher, who delivered the books and tools and obtained their signatures on receipts prior to delivery of the tools.

Appellant fails to call attention to that part of the record where Streicher testified that he did this on instructions from appellant.

> "The Court: Do you know whether they signed a receipt in full?"
>
> "The Witness: I was told to get the receipts signed that way."
>
> "The Court: By whom?"
>
> "The Witness: By Mr. Smith. In other words, I was working under Mr. Smith's direction."
>
> (T. R. 107, 108)

When an attempt was made to go into transactions and relations between witness, Streicher, and the com-

pany, the court sustained an objection and made the following statement:

> "The Court: Objection sustained. Counsel, let me say this. If you desire to show that this witness had any animosity toward the defendant you may bring that out, but the affairs of the corporation are not the problem of this court or this jury." (T. R. 105)

We believe that to be a correct statement of the law of evidence. Appellant was permitted to cross-examine the witness in reference to his connections with the company and to all transactions that had any bearing on the charge against appellant. (T. R. 108-112, incl.)

Appellant's theory of the importance and materiality of the excluded testimony is shown by the statement of counsel made at the time:

> "Mr. Wheeler: I think, may it please the court, it might apply to the credibility of this particular witness, showing that as treasurer of the corporation he had sole control of the financial affairs." (T. R. 105)

In the lengthy cross-examination of witness Streicher, appellant brought out the fact that the witness was an officer of the company, (T. R. 110), but never remotely approached developing any facts that would tend to show a prejudice or bias on the part of the witness.

SPECIFICATION OF ERROR NO. 7

(Appellant's Brief, page 46)

This specification is directed at remarks made by the court during the trial of the case. These remarks were made by the court in making the rulings which are the basis for specifications numbered 1 to 6, inclusive. There being no error in the rulings, we are unable

to discover any prejudice or error in the remarks of the court; and the appellant has failed to point out in what manner the remarks referred to could have prejudiced the appellant.

In the case cited by appellant in support of his position, *Thomas v. District of Columbia, 90 F (2d) 424,* the facts are easily distinguishable from the present case. In that case, the court referred to the defendants as "communists" and refused to hear witness or argument. In the present case, the court very carefully instructed the jury to disregard any of its remarks which might seem to express its opinion. (T. R. 182, 183).

Goldstein v. U.S., 63 Fed. (2d), 609, 614

We believe the last cited case completely answers the appellant's argument in regard to this specification. The decisions on this point are too numerous to cite. We call the court's attention to the following two cases which we believe are sufficient.

Ford v. U.S., 10 Fed. (2d), 339, 347.

Curtis v. U.S., 67 Fed. (2d), 943, 946.

In the latter case, the court used the same expression as was used in the present case, "we are seeking the truth here".

SPECIFICATION OF ERROR NO. 8

(Appellant's Brief, page 51)

This specification is directed at the action of the court in recalling the jury for the purpose of admonishing them after they had been deliberating approximately 50 minutes. The remarks of the court are set out in full in the record (T. R. 191) and in appellant's brief at page 51.

It was proper for the court to inform the jury that their remarks were so loud they could be heard in other parts of the building. It was also proper to inform them that it would be available to receive a verdict up to a certain time and if they did not reach a verdict by that time, comfortable quarters would be provided for them in a hotel.

Appellant's brief leaves the impression that the court told the jury unless they reached a verdict in 20 minutes, quarters would be provided for them (appellant's brief, page 52). In fact, the court told the jury that if they did not reach a verdict by 9:00 o'clock, quarters would be provided for them. These instructions were given to the jury at approximately 5:35 p.m. (T. R. 192).

The case cited by appellant, *Bowman v. State, 207 Ind. 358, 192 N.E. 755, 96 A.L.R. 522,* does not in any manner support appellant. In the first place, it was a State case. The misconduct charge was on the part of bailiff and the Supreme Court of that State held it was not sufficient to justify a reversal.

In addition to the authorities cited in our argument under Specification of Error No. 7, we also wish to call the court's attention to the following cases which we submit should be read in connection with Specifications Nos. 7 and 8:

U.S. v. Ryan, 23 Fed. Sup. 513

Tuckerman v. U.S., 291 Fed. 958, 965, 966

Endelman v. U.S., 86 Fed. 456, 462 (9th Cir.)

Simmons v. U.S., 142 U.S. 148-155

The *Ryan* case (supra) was a district court opinion. In that case, the court told the jury that if it did not reach a verdict in two hours, it would be discharged.

The case of *Simmons v. U.S.* (supra) has been cited with approval in a recent decision of the Supreme Court. *Bute v. Illinois, 333 U.S. 640-650 (Footnote).* The *Endelman* case cited above is a 9th Circuit decision and I have been unable to find any case in which this court has departed from the principle therein enunciated.

Finally, the remarks of the court complained of in Specifications Nos. 7 and 8 in no way expressed or indicated any opinion of the court as to the guilt or innocence of the appellant, no exceptions were taken to any of the remarks, and no requests were made for any instructions to offset or overcome the effects of the remarks complained of, and no exceptions were taken to the instructions as a whole or any part thereof.

CONCLUSION

We, therefore, respectfully submit that the appellant was afforded a fair and impartial trial; that, under the evidence which was practically undisputed, there could be no doubt of appellant's guilt; no errors were committed by the court in the admission or rejection of evidence; the case was submitted to the jury under proper instructions; and the judgment should be affirmed.

Respectfully submitted,

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for the District of Arizona